

1569

United States

1563

Circuit Court of Appeals

For the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY.
OF NEW YORK, a Corporation,
Appellant,

vs.

BERTHA E. LIPP,

Appellee.

Transcript of Record.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON.

FILED

MAY 17 1933

PAUL P. O'BRIEN,

CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY
OF NEW YORK, a Corporation,
Appellant,

vs.

BERTHA E. LIPP,
Appellee.

Transcript of Record.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

—

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Answer	38
Assignment of Errors	45
Bill of Exceptions	52
Bond on Appeal	49
Certificate of Clerk U. S. District Court to Transcript of Record	68
Certificate of Judge to Bill of Exceptions....	66
Citation	1
Complaint	3

EXHIBITS:

Exhibit "A" Attached to Complaint—Life Insurance Policy Dated March 30, 1913, Issued to John A. Lipp by Mu- tual Life Insurance Company of New York	7
Exhibit "B"—Proof of Death of John A. Lipp	32
Exhibit "C"—Supplemental Proof of Death of John A. Lipp	35
Minutes of Court March 2, 1928—Trial.....	42
Names and Addresses of Attorneys of Record	1
Notice of Appeal	44

	Index.	Page
Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including April 30, 1928, to File Record and Docket Cause.....		69
Praeceptum for Transcript of Record		51
TESTIMONY ON BEHALF OF PLAINTIFF:		
CLELAN, JOHN B.		54
LIPP, BERTHA E.		54
MASTERS, W. Y.		53
NOLAND, PAUL F.		54
TESTIMONY ON BEHALF OF DEFENDANT:		
DAVIS, W. P.		59
DIETRICH, E. M.		57
EGGER, JOHN		57
FOLSOM, DR. CHARLES		64
HALL, CHARLES W.		61
HUBER, HENRY		60
KADOW, LEWIS		59
KATZ, ALMA D.		63
LIPP, EMMA		62
LIPP, E. S.		61
MACKEN, J. B.		63
OSBORNE, M. G.		58
SCHMANDER, JOHN		60
THOMPSON, WILLIAM A.		58
Trial		42
Verdict		43

NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD.

McCAMANT & THOMPSON and RALPH H.
KING, American Bank Building, Portland,
Oregon,

For the Appellant.

H. F. McINTURFF, Chamber of Commerce Build-
ing, Portland, Oregon,

WILLIAM T. STOLL, Marshfield, Oregon, and
J. W. McINTURFF, Marshfield, Oregon,

For the Appellee.

In the District Court of the United States for the
District of Oregon.

BERTHA E. LIPP,

Plaintiff,

vs.

THE MUTUAL LIFE INSURANCE COMPANY
OF NEW YORK, a Corporation,

Defendant.

CITATION.

United States of America, to Bertha E. Lipp, Plain-
tiff:

You are hereby notified that in a certain action
in the United States District Court in and for the
District of Oregon wherein Bertha E. Lipp is plain-
tiff and The Mutual Life Insurance Company of

New York is defendant, the defendant has taken its appeal from the judgment made and entered in said cause on the 2d day of March, 1928. You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, thirty days after the date of this citation to show cause if any there be why the judgment appealed from should not be corrected and speedy justice done in that behalf.

WITNESS the Honorable JOHN H. McNARY, Judge of the United States District Court for the District of Oregon, this 19th day of March, 1928.

JOHN H. McNARY,
United States District Judge. [1*]

Due service of the within citation is admitted this 19th day of March, 1928.

W. F. McINTURFF,
Of Attorneys for Plaintiff.

[Endorsed]: Filed Mar. 19, 1928. [2]

In the District Court of the United States for the District of Oregon July Term, 1927.

BE IT REMEMBERED, That on the 8th day of September, 1927, there was duly filed in the District Court of the United States for the District of Oregon, a complaint, in words and figures as follows, to wit: [3]

*Page-number appearing at the foot of page of original certified Transcript of Record.

In the United States District Court for the District
of Oregon.

BERTHA E. LIPP,

Plaintiff,

vs.

THE MUTUAL LIFE INSURANCE COMPANY
OF NEW YORK, a Corporation,

Defendant.

COMPLAINT.

That plaintiff, for a cause of action against the defendant, alleges that:

I.

At all the times herein mentioned she was and still is a citizen and resident of the State of Oregon.

II.

At all the times herein mentioned the defendant was and still is a corporation duly created and existing under the laws of the State of New York and it thereby became and still is a citizen and resident of the State of New York.

III.

The matter and amount in controversy between the plaintiff and defendant in this action exceeds, exclusive of interest and costs, the sum or value of \$3,000, viz., \$4,250.00.

IV.

The plaintiff is the relict of the hereinafter mentioned John A. Lipp.

V.

On, to wit, the 3d day of March, 1913, John A. Lipp made and signed a written application to the defendant for a \$3,000 policy, insuring his life, and on said date, submitted to a medical examination by a physician of the defendant's selection, and who, upon such examination, found and certified that he was in good health, and on the 30th day of March, 1913, the defendant, [4] being satisfied as to the insurability of said John A. Lipp, accepted said application and duly executed and delivered its policy to him whereby it agreed, among other things, that in consideration of the annual premium of \$50.79, the receipt of which it then acknowledged, and the payment of a like amount upon each 30th day of September and March thereafter until twenty full years' premiums should have been paid, or until the prior death of said John A. Lipp, it would pay to the plaintiff as his beneficiary \$3,000, upon receipt at its Home Office (New York City) of due proof of the death of said John A. Lipp, less any indebtedness thereon to the defendant, and any unpaid portion of the premium for the then current policy year; a true copy of which policy, with said application attached thereto, is attached hereto marked Exhibit "A" and made a part of this complaint. Neither the said John A. Lipp nor the plaintiff were ever paid or credited with any of the dividends owing on said policy and the plaintiff does not know the exact amount of such dividends, but she is informed and believes and therefore alleges that the same amounts to \$535.00.

VI.

Said John A. Lipp and plaintiff duly and regularly paid the premiums on said policy as they became due and otherwise performed all of the terms and conditions of said policy on his or their part.

VII.

On or about January 31, 1924, said John A. Lipp died at or near Vancouver, in Clark County, Washington, at or near Portland, Multnomah County, Oregon, by drowning in the Columbia River.

VIII.

On, to wit, April 10, 1926, the plaintiff in writing requested the defendant to furnish her blank forms for making proofs of death of said John A. Lipp, and defendant on April 24, 1926, in writing, refused such request and thereby waived proofs of death and it should not now be heard to say that such proofs were not made. [5]

IX.

Thereafter on, to wit, April 26, 1926, the plaintiff made and mailed to the defendant at its address in New York City, in the State of New York, due proof of the death of said John A. Lipp, duly verified by her and by Lyle J. and Reta Lipp, the son and daughter of the plaintiff and said John A. Lipp, and demanded payment of said policy, a true copy of which is hereto annexed, marked Exhibit "B" and made a part hereof.

X.

On, to wit, June 4, 1926, the defendant in writing acknowledged receipt to the plaintiff of said proofs

of death and denied any liability to the plaintiff and refused payment of said policy upon the ground that said proofs of death were "not sufficient to satisfactorily prove the death of said John A. Lipp."

XI.

Thereafter on July 9, 1926, the plaintiff in writing made, and on July 12, 1926, mailed to the defendant at its Home Office in New York City supplemental proofs of the death of said John A. Lipp duly verified by her, a true copy of which is hereunto annexed, marked Exhibit "C" and made a part hereof.

XII.

On the 29th day of October, 1926, the defendant in writing acknowledged receipt of such supplemental proofs of death, and again denied any liability to the plaintiff and refused payment of said policy to her, stating that it had made an investigation and was satisfied that said John A. Lipp was not dead.

XIII.

The plaintiff has been required to employ attorneys to enforce payment of said policy; \$1,000 is a reasonable sum to be allowed the plaintiff for that purpose.

WHEREFORE plaintiff prays judgment against the defendant, 1st: For the sum of \$3,000, the face of said policy; 2d: For \$535, the dividends owing on said policy, with interest on both of said sums at the rate of 6% per annum from June 3, 1926, [6] 3d.

For \$1,000 attorney's fees; and 5th. For the costs of this action.

H. F. McINTURFF,
Residing at Portland, Oregon.
WM. T. STOLL and
J. W. McINTURFF,
Attorneys for Plaintiff.
Residing at Marshfield, Oregon. [7]

EXHIBIT "A."

Limited Payment Life.

THE MUTUAL LIFE INSURANCE COMPANY
OF NEW YORK.

IN CONSIDERATION of the $\frac{1}{2}$ annual premium of fifty and $\frac{79}{100}$ Dollars the receipt of which is hereby acknowledged, and of the payment of a like amount upon each thirtieth day of September and March hereafter until twenty full years' premiums shall have been paid or until the prior death of the insured,

PROMISES TO PAY at the home office of the company in the City of New York upon receipt at said home office of due proof of death of John A. Lipp of near Vancouver, County of Clarke, State of Washington, herein called the insured, THREE THOUSAND DOLLARS, less any indebtedness hereon to the company and any unpaid portion of the premium for the then current policy-year, upon surrender of this policy properly receipted to his wife, *Bertha E. Lipp*, the beneficiary with the right to the insured to change the beneficiary.

Number
2057529

Amount
\$3000.

Age
26

$\frac{1}{2}$
Annual
Premium
for 20
years

\$50.79

Death of Beneficiary before insured: Change of Beneficiary.—If any beneficiary die before the insured, the interest of such beneficiary shall vest in the insured, unless otherwise provided herein.

When the interest of a beneficiary shall have vested in the insured, or when the right to change the beneficiary has been reserved, the insured, if there be no existing assignment of this policy, may, while this policy is in force, designate a new beneficiary, with or without reserving the right to change the beneficiary, by filing written notice thereof at the home office of the company accompanied by this policy for suitable endorsement hereon. Such change shall take effect upon the endorsement of the same on the policy by the company.

Premiums.—All premiums are payable in advance at said home office or to any agent of the company upon delivery, on or before date due, of a receipt signed by either the President, Vice-President, Second Vice-President, Secretary or Treasurer of the Company and counter-signed by said agent.

A grace of thirty days (or one month if greater) subject to an interest charge at the rate of five per centum per annum shall be granted for the payment of every premium after the first, during which time the insurance shall continue in force. If death occur within the period of grace, the overdue premium and the unpaid portion of the premium for the then current policy year, if any, shall be deducted from the amount payable hereunder. Except as herein provided the payment of a premium

or instalment thereof shall not maintain this policy in force beyond the date when the next premium or instalment thereof is payable. If any premium or instalment thereof be not paid before the end of the period of grace, then this policy shall immediately cease and become void, and all premiums previously paid shall be forfeited to the company except as hereinafter provided. [8]

CONDITIONS:

Residence and travel.—This policy is free from any restriction as to residence and travel.

Occupation.—This policy is free from any restriction as to military or naval service, and as to other occupations of the insured it is free from any restriction after one year from its date of issue, as set forth in the provisions of the application endorsed hereon or attached hereto.

Suicide.—The Company shall not be liable hereunder in the event of the insured's death by his own act, whether sane or insane, during the period of one year after the date of issue of this policy, as set forth in the provisions of the application endorsed hereon or attached hereto.

INCONTESTABILITY.—This policy shall be incontestable, except for non-payment of premiums, provided two years shall have elapsed from its date of issue.

This policy and the application herefor, copy of which is endorsed hereon or attached hereto, constitute the entire contract between the parties hereto. All statements made by the insured shall, in the

absence of fraud, be deemed representations and not warranties, and no such statement of the insured shall avoid or be used in defence to a claim under this policy unless contained in the written application herefor and a copy of the application is endorsed on or attached to this policy when issued.

If the age of the insured has been misstated, the amount payable hereunder shall be such as the premium paid would have purchased at the correct age.

Amount of Insurance Payable at Death.

Premiums Payable for Twenty Years or until Prior Death.

ANNUAL DIVIDENDS.

PARTICIPATION.

Annual Dividends.—This policy shall participate in the surplus of the company and the proportion of the surplus accruing hereon shall be ascertained and distributed annually on the anniversary of its date of issue. At the option of the insured or the owner of this policy such dividends shall be either,—

- (1) Paid in cash; or
- (2) Applied toward the payment of any premium or premiums; or
- (3) Applied to the purchase of paid-up participating additions to the policy; or
- (4) Left to accumulate to the credit of the policy with interest at the rate of three per centum per annum compounded annually and payable at the maturity of the policy, but with-

drawable on any anniversary of the policy (hereinafter referred to as "dividend deposits").

Unless the insured or the owner of this policy shall elect otherwise within three months after the mailing by the company of a written notice requiring the election of one of the four above options, the dividends shall be applied to the purchase of paid-up additions, as per option (3). Such paid-up additions may be surrendered at any time for a cash value which shall not be less than the original cash dividends as per option (1), provided the reserve for such paid-up additions has not been applied to purchase extended insurance or paid-up insurance in accordance with the provisions of the clause entitled "Options on Surrender or Lapse." [9]

Post-mortem Dividend.—On the death of the insured, a dividend will be credited to this policy for the fraction of a year, if any, from the due date of the last annual dividend, or from the original date of the policy if death takes place in the first policy-year, to the date of such death. Such dividend shall be payable in cash with the amount insured.

LOANS.—At any time after three full years' premiums have been paid and while this policy is in force, the company will advance on the execution of a proper loan agreement and on proper assignment and delivery of this policy and on the sole security hereof, an amount which, with interest thereon to the end of the current policy-year, shall be equal to, or at the option of the owner less than, the

cash value at the end of said year; any existing loan hereon with accrued interest, and any unpaid portion of said current policy-year's premium shall be paid out of such advance. Interest on the loan will be at the rate of six per centum per annum payable at the end of each policy-year and this interest, if not paid when due, shall be added to the existing loan and shall bear interest at the same rate. The loan with accrued interest may be repaid to the company at any time. Failure to repay any such advance or to pay interest shall not avoid this policy unless the total indebtedness hereon to the company shall equal or exceed the cash value at the time of such failure, nor until one month after notice shall have been mailed by the company to the last known address of the insured and of the assignee of record, if any, at the Home Office of the Company. (If a loan is desired before three full years' premiums have been paid, the unpaid balance of the three full years' premiums may be paid by deduction from the loan when made if the amount which can be loaned is sufficient.)

ASSIGNMENT.—No assignment of this policy shall be binding upon the company unless it be filed with the company at its said home office. The company assumes no responsibility as to the validity of any assignment.

OPTIONS ON SURRENDER OR LAPSE.—After this policy shall have been in force three full years, the owner, within three months after any

default in payment of premium but not later, may elect either,

- (a) to surrender this policy for its cash value less any indebtedness to the company hereon (this balance is hereinafter referred to as the net cash value); or
- (b) to have the insurance continued in force as term insurance from the date of such default, without future participation and without the right to loans or cash value, for an amount equal to the face amount of this policy and any outstanding dividend additions less any indebtedness to the company hereon; or
- (c) to purchase non-participating paid-up life insurance payable at the same time and on the same conditions as this policy.

The cash value under option (a), after premiums have been paid for three full years or more, will be the reserve at the date of default for the face amount of this policy and for any dividend additions hereto, computed according to the American Experience Table of Mortality assuming interest at the rate of three per centum per annum, less a surrender charge which, in no case, shall be more than one and one-half per centum of the face amount insured by this policy; after premiums have been paid for ten full years or more there shall be no surrender charge. [10]

The term for which the insurance will be continued under option (b), or the amount of the paid-up life insurance obtainable under option (c), will be such as the net cash value obtainable under

option (a) will purchase at the attained age of the insured at the date of default when applied as a net single premium according to the American Experience Table of Mortality assuming interest at the rate of three per centum per annum.

If this policy shall not, within three months after default in payment of premium, have been surrendered to the company at its home office for its cash value as provided in option (a), or for paid-up insurance as provided in option (c), the insurance will be automatically continued as provided in option (b).

TABLE OF LOAN AND SURRENDER VALUES.

The values in the following table are computed in accordance with the above provisions and upon the assumption that premiums have been paid in full for the number of years the "Policy has been in force." If there be any indebtedness to the company on the policy, or if there be any outstanding dividend additions, the values will be modified as hereinbefore provided.

The cash and loan values and the paid-up life insurance stated in the following table apply to a policy for \$1,000. As this policy is for \$3,000 the cash loan or paid-up life insurance available at the end of any policy-year will be three times the amount stated in the table for that year.

The period of paid-up continued insurance remains the same for a policy of any amount.

The figures contained in this table represent the actual amounts available after deduction of the

surrender charge, if any, but without allowance for dividend additions or indebtedness.

	Column 1	Column 2	Column 3		
After policy has been in force	*Cash value **Loan value	Paid-up non-participating life insurance	Paid up non-participating continued (term) insurance for		
			Years	Months	Days
3	\$ 46.00	\$120	6	0	0
4	64.08	166	8	7	0
5	87.42	222	12	0	0
6	109.00	273	15	1	0
7	133.83	329	18	5	0
8	159.44	386	21	5	0
9	185.86	442	23	11	0
10	213.12	498	26	2	0
11	238.75	548	27	9	0
12	265.28	598	29	2	0
13	292.73	648	30	5	0
14	321.16	699	31	7	0
15	350.59	749	32	8	0
16	381.06	799	33	10	0
17	412.62	849	35	2	0
18	445.33	899	36	10	0
19	479.19	949	39	2	0
20	514.30				
21	524.23				
22	534.37	POLICY FULL PAID			
23	544.70	PARTICIPATING			
24	555.22				
25 years	565.89				

3 K Age 26

Values for later years will be computed upon the above stated basis and will be furnished upon request.

*The cash value provided for in the above table for the end of a policy-year, less interest thereon at the rate of six per centum per annum to the end of such policy-year, can be obtained during such policy-year provided all premiums due prior to the end of such policy-year shall have been duly paid.

**The loan value provided for in the above table for the end of a policy-year can be obtained (less interest) during such policy-year as explained in the above clause entitled "Loans."

Any dividend deposit standing to the credit of this policy at date of surrender or lapse shall then be payable in cash in addition to payment of the cash value or to the granting of the paid-up life or term insurance above provided for.

REINSTATEMENT.—Unless it shall have been surrendered for its cash value, this policy may be reinstated at any time within three years from date of default in payment of any premium, upon evidence of insurability satisfactory to the company and upon payment of the arrears of premium with interest thereon at the rate of five per centum per annum, and, at the option of the insured, either (a) upon payment in cash to the company of any indebtedness which existed at said date of default together with interest thereon at the rate of six per centum per annum, compounded annually, or

(b) upon reinstatement of such indebtedness increased by the amount of interest thereon at the rate of six per centum per annum, compounded annually, provided such reinstated increased indebtedness does not exceed the loan value at the date to which reinstatement is made.

MODES OF SETTLEMENT.—If election be made as hereinafter provided, the net sum payable under this policy at death of the insured, provided such net sum be not less than \$1,000 will be settled in one of the following methods in lieu of being then paid in one sum:

(1) By the payment of interest at the rate of three per centum per annum on said net sum, payable at the end of each year during the lifetime of the beneficiary, and by the payment upon the death of the beneficiary of the said net sum together with any accrued interest for the year then current, unless otherwise directed in the notice of election, to the beneficiary's executors, administrators or assigns.

(2) By the payment of equal annual instalments for a specified number of years, the first instalment being payable immediately, in accordance with the following table for each one thousand dollars of said net sum.

(3) By the payment (2) of twenty equal annual instalments certain, whether the beneficiary lives or dies, the first annual instalment being payable immediately, and the twentieth annual instalment being payable nineteen years later, and (b) of annual instalments of a like amount thereafter throughout the remaining lifetime of said benefi-

ary, the first of such annual instalments being payable one year after the twentieth annual instalment certain provided said beneficiary be then alive, the payments terminating with the last annual instalment preceding the death of said beneficiary, in accordance with the following table for each one thousand dollars of said net sum. [12]

Any instalments payable under (2) or (3) which shall not have been paid prior to the death of the beneficiary shall be paid, unless otherwise directed in the notice of election to the beneficiary's executors, administrators or assigns.

The above modes of settlement (1) and (3) are not available if the beneficiary be a corporation, a partnership or an association. The election of any of the foregoing modes of settlement may be made by the insured and the beneficiary jointly; or, if the right to change the beneficiary has been reserved by the insured alone; or, after the death of the insured, if no election shall have been made by the beneficiary. If the policy be assigned, the assignee must join in any election. Such election shall be made by giving the company written notice at its home office. This policy, upon its maturity, if such election shall have been made, shall be surrendered to the company and a supplementary contract shall be issued for the mode of settlement elected. Such supplementary contract shall participate annually in the excess of interest earnings over three per centum per annum, at the same excess rate each year as is used in the dividend calculations of that year in the case of policies

issued in the same year as this policy, but if settlement be made under mode of settlement (3), only that part of the supplementary contract providing for instalments for the fixed period of twenty years shall participate. Unless otherwise specified in the written notice making election of one of the foregoing modes of settlement, the supplementary contract may at any time be surrendered to the company and the company will pay for the legal surrender thereof, (a) where mode of settlement (1) has been elected, the said net sum together with interest thereon to date of surrender at the rate of three per centum per annum for the fractional part of a year, if any, for which interest shall not have already been paid, (b) where any other of the above modes of settlement has been elected, the commuted or present value of the payments certain yet to be made, exclusive of participation, computed at three per centum interest, compounded annually; provided that no such surrender and commutation will be made under mode of settlement (3) except after the death of the beneficiary occurring within the aforesaid twenty years.

TABLE OF ANNUAL INSTALMENTS FOR
EACH \$1,000.

If so requested in writing when making the election, these instalments will be paid in fractional parts, semi-annually, quarterly, or monthly, the total of the fractional payments each year being equal to the annual payment provided for by this table. [13]

Agents are not authorized to modify this policy or to extend the time for paying a premium.

IN WITNESS WHEREOF the company has caused this policy to be executed this thirtieth day of March, 1913.

CHARLES A. PEABODY,
President.

W. J. EASTON,
Secretary.

Countersigned: (Illegible),
Registrar. [14]

THIS APPLICATION

Is made to THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK. All the following statements and answers, and all those that I make to the company's Medical Examiner, in continuation of this application, are true, and are offered to the company as an inducement to issue the proposed policy, which shall not take effect unless and until the first premium shall have been paid during my continuance in good health, and unless also the policy shall have been issued during my continuance in good health; except in case a binding receipt shall have been issued as hereinafter provided.

1. My full name is John A. Lipp.
2. I reside at Waucomah Farm, in the City of near Vancouver, County of Clarke, State of Washington.
3. My place of business is Waucomah Farm.

4. My P. O. address is Walucomah Farm, Vancouver, Wash.
5. My present occupation is Farmer in the following branch of business of trade: Farming.
6. My other occupations are same.
7. My former occupations have been same.
8. I do not contemplate going to any foreign country except: None.
9. My former residences were Clinton Co., Indiana.
10. The full name of the person to whom the policy is to be payable is Bertha E. Lipp.
11. Residing in Clarke Co., Washington.
12. The relationship of said beneficiary to me is wife.
13. The insurable interest of the said beneficiary in the life proposed for insurance, other than that of family relationship is none.
14. Do you wish the privilege of changing the beneficiary from time to time provided the policy has not been assigned? Yes.
15. I hereby apply for insurance on my life on the Limited Life plan, premiums payable for twenty years.
16. Amount, \$3,000.00.
17. The premiums are to be paid $\frac{1}{2}$ annually.
18. I was born on the 8th day of April, 1887, in Clinton Co., Indiana.
19. I am a citizen or subject of the U. S. A.
20. I have been *accpeted* for insurance under the

following policies in this company: None.
[15]

21. I am insured in other companies and associations as follows: None, and in no others.
22. I have never made an application nor submitted to an examination for life insurance upon which a policy has NOT been issued on the plan and premium rate originally applied for, EXCEPT to the following companies or associations: None.
23. No negotiations for other insurance are now pending or contemplated except: None.

During the period of one year following the date of issue of the policy of insurance for which application is hereby made, I will not engage in any of the following extrahazardous occupations or employments; retailing intoxicating liquors, handling electric wires or dynamos, blasting, mining, submarine labor, aeronautic ascensions, the manufacture of highly explosive substances, service upon any railroad train or track or in switching or in coupling cars, or on any steam or other vessel, unless written permission is expressly granted by the company. It is understood and agreed that the risk of death will not be covered by the policy provided such death occur by my own act, whether sane or insane, during the period of one year next following the date of issue.

I have paid \$—— in cash to the subscribing agent who has furnished me with a binding receipt therefor signed by the secretary of the company making the insurance in force from this date pro-

vided this application shall be approved and the policy duly issued.

Dated Portland 3/20/1913.

Signature of person whose life is proposed for insurance:

JOHN A. LIPP.

I have known the above-named applicant for *intorluced* and saw him sign this application. I have issued binding receipt No. _____.

J. B. MACKEN,
Soliciting Agent.

STATEMENTS TO MEDICAL EXAMINER.

1. What is your full name? John A. Lipp.
2. Age at last birthday. 25.
3. Are you married? Yes.
4. What illnesses, diseases or injuries have you had since childhood? (The examiner should satisfy himself that the applicant gives full and careful answers to this question.)
Names of diseases etc: Typhoid.
Number of attacks: One. Date of each: 1902. Duration: 12 weeks. Severity: Severe. Results: Cure. Date of complete recovery: 1902.
5. Have you stated in answer to question 4 all such illnesses, diseases or injuries? Yes.
6. State every physician who has prescribed for you or whom you have consulted in the past five years.

Name of physician. Address. When consulted. Nature of complaint. Give full details above under Q. 4. [16]

7. (a) Are you now in good health? Yes.
- (b) If not what is the impairment? ——.
8. Have you ever raised or spat blood?
No.
9. (a) Have you a rupture or a hernia? No.
- (b) If so, do you wear a suitable truss?
10. Have you undergone any surgical operation? No.
11. Have you any bodily deformity? No.
12. Have you any impairment of sight or hearing? No.
13. (a) Do you use wine, spirits or malt liquors?
Yes.
- (b) If so what kind have you used during the past year and how much in any one day at the most? Occasionally glass beer.
- (c) What has been your daily average in the past year? No daily average.
- (d) Have you been intoxicated during the past five years? No.
- (e) Have you ever taken treatment for alcoholic or drug habit? No.
- (f) If a total abstainer, how long have you been so? ——.
14. (a) Have you gained or lost weight in the past year? No.
- (b) If so how much and from what cause?
——.

15. (a) Have you ever been under treatment at any asylum, cure, hospital or sanitarium? No.
- (b) If so when, how long and for what?
_____.
16. (a) What is your present occupation?
Farming.
- (b) How long have you been engaged in this occupation? All life.
- (c) What other occupation have you been engaged in? None.
- (d) Do you contemplate making any change temporary or permanent, in your occupation? No.
- (e) Are you now or have you ever been engaged in any way in the sale or manufacture of beer, wine, or other intoxicating liquors? No.
17. (a) Have you ever changed your residence on account of your health? No.
- (b) Do you contemplate making any change in your place of residence? No.

18. Family record of applicant.

	Living Age	Health	Age	Dead Specific cause of death	How long sick
Father	48	Good.			
Mother	44	Good.			
Brothers.					
Number living.	1				
Number dead.	0				
Sisters.					
Number living.	2				
Number dead.	0				
Age of father's father if living.	22	Good.			80.
Age of father's mother if living.	20	Good.			80.
Age of mother's father if living.					60.
Age of mother's mother if living.					77.

19. Has there ever been any suspicion that any one of those mentioned in (18) above ever had tuberculosis or consumption, insanity, epilepsy, paralysis, or cancer? Father's father. Cancer face.
20. Has any member of your household suffered from tuberculosis or consumption during the past year? No.
21. If so, give details. ———

Dated at Portland, State of Oregon, the 30th day of March, 1913.

I certify that my answers to the foregoing questions are correctly recorded by the Medical Examiner.

JOHN A. LIPP.

Signature of the person examined.

Witness:

OTIS B. WEGHER (?) M.D.

WAIVER OF PREMIUM IN THE EVENT OF
PERMANENT TOTAL DISABILITY.

The premium stated on the face of policy No. 2057529 (to which policy this agreement is attached and of which it forms a part) includes an additional premium of \$0.30 payable for twenty full years, or until the prior death of the insured, and in consideration of the payment of such additional premium THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK hereby grants the following

**WAIVER OF PREMIUM IN THE EVENT OF
PERMANENT TOTAL DISABILITY.**

If the insured, after payment of premiums for at least one full year and before default in the payment of any subsequent premium, and before attaining the age of sixty years, and while this policy is in full force, shall furnish proof satisfactory to the company, at its home office in the City of New York, that he has become wholly and permanently disabled by bodily injury or disease so that he is and will be permanently, continuously and wholly prevented thereby from performing any work for compensation or profit or from following any gainful occupation, and that such disability has existed continuously for not less than sixty days, the company will waive payment of premiums thereafter becoming due under this policy during the continuance of such disability. The premiums so waived shall not be deducted from the sum payable under the policy, and the values provided for in the paragraphs entitled "Loans" and "Options on Surrender or Lapse" and in the "Table of Loan and Surrender Values" shall be the same as if the premiums had continued to be paid to the company regularly when due. Provided that, notwithstanding proof of disability may have been accepted by the company as satisfactory, the insured shall at any time on demand, furnish to the company satisfactory proof of the continuance of such disability, and if the insured shall fail to furnish such proof, or if it shall appear to the company that the insured is able to perform

any work or to follow any occupation whatsoever for compensation, gain or profit, all premiums thereafter falling due shall be paid in conformity with the policy. [18]

Without prejudice to any other cause of disability, the entire and irrecoverable loss of the sight of both eyes, or the severance of both hands at or above the wrists, or of both feet at or above the ankles, or of one entire hand and one entire foot, will be considered as total and permanent disability within the meaning of this provision, and the company upon satisfactory proof of such loss or severance will waive the premiums thereafter becoming due under the policy.

After the premium stated on the face of the policy has been paid for the full number of years stated above, it will be reduced, if premiums are payable thereafter, by the amount of the above additional premium.

Dated at New York the 30th day of March, 1913.

CHARLES A. PEABODY,
President.

W. J. EASTON,
Secretary,

Countersigned: (Illegible),
Registrar. [19]

EXHIBIT "B"

PROOF OF DEATH—JOHN A. LIPP.

To the Mutual Life Insurance Company of New York:

The undersigned, Bertha E. Lipp, wife of John A. Lipp, and the beneficiary named in policies numbered 2,057,529 and 2,176,946, the former for the amount of \$3,000.00 dated March 13, 1913, the latter for \$2,000.00, dated September 15, 1914, issued to John A. Lipp, insuring his life against death, hereby gives notice to the Mutual Life Insurance Company of New York that said John A. Lipp died at or near Vancouver, in Clarke County, Washington, or at or near Portland, Oregon, on or about January 31, 1924.

The circumstances connected with and surrounding his death are as follows:

1st. On the 31st day of January, 1924, said John A. Lipp left his home for the purpose of going to Portland, Oregon, on a matter of business, fully intending to return the same day; he drove a Nash truck propelled by gasoline; he was alone and drove the truck as far as Vancouver, a distance of four miles from his home, and abandoned it there; he then rode with a friend to the outskirts of Portland near the the Columbia River, started toward and in the direction of the Columbia River and has never been seen or heard of since that time. His disappearance was reported to the officers of Vancouver and Portland and a search was made to find

him; his disappearance was given publicity by the newspapers of Portland and Vancouver; inquiry and search were made for him of many persons who knew him or who were likely to know of his whereabouts and in all places where there was a probability of his being, but no trace or word of him has ever been had by his family or the officers. A human skull was found by the officers in the month of January, 1926, in the Columbia River below Vancouver and Portland, which it is believed is that of the insured.

2nd. On the date of his disappearance and for some time prior thereto the mental condition of said John A. Lipp was such as to excite the anxiety of his family and friends; that is to say, he had suffered severe headaches, was unduly despondent and had threatened to commit suicide. On the morning of his departure (January 31st, 1924) he drove to the gate of the farm on which he resided, then stopped and for some moments looked back longingly toward his home and then drove away.

3rd. Said John A. Lipp was an honored and upright citizen, who through all of his life had enjoyed the confidence of all who knew him; he was solvent, prosperous and successful in his business affairs, rich in the affections and esteem of his wife, children and parents, devoted to them and attached to their society, with no habits contrary to those traits of character and he had never absented himself from his family. [20]

4th. His family believe him to be dead; that he committed suicide by drowning in the Columbia

River on said 31st day of January, 1924, and there is no other way or method of accounting for his disappearance.

The undersigned, Bertha E. Lipp, therefore respectfully demands payment, to her, through her attorney, H. F. McInturff, 321 Chamber of Commerce Building, Portland, Oregon, of said policies, i. e., for \$5,000.00 with interest thereon from this date at the rate of 6% per annum.

Dated at Portland, Oregon, this 26th day of Apr., 1926.

(Sgd.) BERTHA E. LIPP.

State of Oregon,
County of Multnomah,—ss.

I, Bertha E. Lipp, being first duly sworn, on my oath say that I have signed the foregoing proof of death, know the contents thereof, and that the matters and things therein stated are true as I verily believe.

(Sgd.) BERTHA E. LIPP.

Subscribed and sworn to before me this 26th day of April, 1926.

[Seal] (Sgd.) H. F. McINTURFF,
Notary Public.

My commission expires March 12, 1930.

State of Oregon,
County of Multnomah,—ss.

We, Lyle J. Lipp and Reta Lipp, being each duly sworn, on oath say that I, Lyle J. Lipp, am the son of said John A. Lipp, nineteen years of age; I, Reta Lipp, am the daughter of said John A. Lipp. I

have read the foregoing proof of death of John A. Lipp, signed and sworn to by *Bertah* E. Lipp, and I believe the facts therein stated to be true. My father, John A. Lipp, was a devoted and affectionate parent, deeply attached to me and the other members of his family. I am confident that were he alive he would have come home long ago or made his whereabouts known to his family. I sincerely believe him to be dead and cannot account for his disappearance in any other way.

(Sgd.) LYLE J. LIPP.

(Sgd.) RETA LIPP.

Subscribed and sworn to before me this 24th day of April, 1926.

[Seal] (Sgd.) H. F. McINTURFF,
Notary Public.

My commission expires March 12, 1930. [21]

EXHIBIT "C."

SUPPLEMENTAL PROOF OF DEATH—JOHN
A. LIPP. POLICIES No. 2,057,529 and
2,176,946, AGGREGATING \$5,000.

To Mutual Life Insurance Company of New York:

On May 27, 1926, I mailed you proofs of death of John A. Lipp, who held policies above described and in which I am named as the beneficiary. On June 4, 1926, you acknowledged receipt thereof to my attorney, H. F. McInturff, denying any liability in the premises, for the reason "that the same (proofs of death) are not sufficient to satisfactorily prove the death of John A. Lipp." For the purpose

of overcoming your objection, I am furnishing you the following additional data as to the disappearance and death of said insured, which I furnish as a supplement to said former proofs of May 27th, 1926, and request you to consider them a part thereof, viz.:

(a) On January 31, 1924, when he left his home for the purpose of going to Portland, as he stated in paragraph 1st of said proofs of death, he, (John A. Lipp) had no clothing with him except such as he had on his person, and he had with him no money except sufficient to pay the expense incidental to his trip to Portland, not to exceed \$8.00.

(b) Said John A. Lipp idolized our daughter Reta, then approaching her sixteenth birthday, Feb. 1st, 1924. He had arranged a birthday party for her, and to that end had painted, papered and otherwise fixed up and beautified our humble home. He entered into the matter with the spirit, zeal and enthusiasm of a boy, and though suffering and at times despondent as stated in paragraph 2nd of said proofs of death, he was joyous at the approach of the event, which to him was the event of a lifetime. That he should particularly at such a time abandon us with no word of an intention to do so, is utterly unreasonable and contrary to all human experience.

(c) I have had a diagram made by Dr. E. F. Newton, a dentist of Cathlamet, Washington, of the upper and lower jaws of the skull found in the Columbia River, referred to in paragraph 1st of said [22] proofs of death, showing the condition

of the teeth, the absence of some and the fillings in others, which corresponds with the condition of Mr. Lipp's teeth at or about the time of his disappearance, with a few exceptions, caused as I believe by exposure to the elements for a long period of time, and I am therefore reasonably confident that the skull is that of John A. Lipp.

(d) If there are any other matters concerning which you want information, I will be pleased to give you them.

I now once more respectfully demand payment to me through my attorney, H. F. McInturff, 321 Chamber of Commerce Building, Portland, Oregon, of said policies, aggregating \$5,000.00, with interest at six per cent (6%) from April 26th, 1926.

(Sgd.) BERTHA E. LIPP.

State of Oregon,
County of Multomah,—ss.

I, Bertha E. Lipp, being first duly sworn, on my oath say: I have read the foregoing supplemental proofs of death, I know the contents thereof and that the matters and things therein stated are true as I verily believe.

(Sgd.) BERTHA E. LIPP.

Subscribed and sworn to before me this — day of July, 1926.

[Seal] (Sgd.) H. F. McINTURFF,
Notary Public for Oregon.

My commission expires March 12, 1930.

State of Oregon,
County of Multomah,—ss.

I, *Bertah E. Lipp*, being first duly sworn, depose and say that I am the plaintiff in the above-entitled action; and that the foregoing complaint is true as I verily believe.

(Sgd.) BERTHA E. LIPP,

Subscribed and sworn to before me this 8 day of August, 1927.

[Seal]

H. F. McINTURFF,
Notary Public for Oregon.

My commission expires 3/12/30.

Filed September 8, 1927. [23]

AND AFTERWARDS, to wit, on the 20th day of September, 1927, there was duly filed in said court an answer, in words and figures as follows, to wit: [24]

[Title of Court and Cause.]

ANSWER.

Comes now the defendant and for its answer to the complaint of plaintiff—

I.

Denies all knowledge or information sufficient to form a belief as to the allegations contained in Paragraph I.

II.

Admits the allegations of Paragraph II.

III.

Admits the allegations of Paragraph III.

IV.

Denies each and every allegation contained in Paragraph IV.

V.

Admits that on or about the 3d day of March, 1913, John A. Lipp signed a written application to the defendant for a \$3,000.00 policy insuring the life of the said John A. Lipp and that on the 30th day of March, 1913, the defendant issued to the said John A. Lipp its policy Number 2,057,529, calling for a semi-annual premium of \$50.79 payable on the 30th of September and the 30th of March in each year subsequent to the date of said policy. Denies each and every other allegation contained in Paragraph V and denies that the policy issued was in form as set forth in Exhibit "A" attached to the complaint.

VI.

Denies each and every allegation contained in Paragraph VI except that the defendant admits that the said John [25] A. Lipp paid the premiums on the said policy of life insurance down to and including March 30th, 1924.

VII.

Denies each and every allegation contained in Paragraph VII.

VIII.

Denies each and every allegation contained in Paragraph VIII.

IX.

Denies each and every allegation contained in Paragraph IX except that the defendant admits that on the 26th of April, 1926, plaintiff mailed a communication to the defendant and demanded therein the payment by the defendant of the insurance policy above referred to.

X.

Denies each and every allegation contained in Paragraph X except that the defendant admits that it denied and continues to deny its liability to plaintiff for the payment of any money on the insurance policy above referred to.

XI.

Denies each and every allegation contained in Paragraph XI except that defendant admits that plaintiff, in the summer of 1926, mailed to defendant a communication entitled "Supplemental Proof of Death."

XII.

Denies each and every allegation contained in Paragraph XII except that the defendant admits that it denied and still denies its liability to the plaintiff for the payment to the plaintiff of any money on the policy of life insurance above referred to, and that defendant was satisfied and still is satisfied that the said John A. Lipp is not dead.

XIII.

Denies each and every allegation contained in Paragraph XIII. [26]

WHEREFORE the defendant demands judgment that plaintiff take nothing by her action herein and that the defendant recover its costs and disbursements.

McCAMANT and THOMPSON,
Attorneys for Defendant.

District of Oregon,—ss.

I, Alma D. Katz, being duly sworn do depose and say that I am the general managing agent in Oregon of the above-named defendant and that the foregoing answer is true as I verily believe.

ALMA D. KATZ.

Subscribed and sworn to before me this 19th day of September, 1927.

[Seal]

PAUL F. NOLAN,
Notary Public for Oregon.

My commission expires ———.

Due service of the within answer is admitted this 20th day of September, 1927. On approval:

H. F. McINTURFF,
By ROBERT MEARS,
Attorneys for Plaintiff.

Filed September 20, 1927. [27]

AND AFTERWARDS, to wit, on Friday, the 2d day of March, 1928, the same being the 91st judicial day of the regular November term of said court—Present, the Honorable JOHN H. McNARY, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [28]

[Title of Court and Cause.]

MINUTES OF COURT—MARCH 2, 1928—
TRIAL.

Now at this day come the parties hereto by their counsel as of yesterday, whereupon the jury impaneled herein come into court, answer to their names and return to the Court their duly sealed verdict in words and figures as follows, viz.:

“We, the jury duly empaneled and sworn to try this cause, find for the plaintiff and assess her damages at \$3,535.00 with interest thereon at 6% per annum from July 20th, 1926, to date, aggregating \$342.30.

We also find that \$800.00 is a reasonable attorney fee to be allowed the plaintiff for bringing and prosecuting this action.

Wherefore, we find our verdict in favor of the plaintiff and against the defendant in the aggregate sum of \$4,677.30.

W. H. DURHAM,
Foreman.”

which verdict is received by the Court and ordered to be filed. Whereupon

IT IS ADJUDGED that plaintiff do have and recover of and from said defendant said sum of \$3,535.00 assessed as damages in said verdict, with interest thereon at 6% per annum from July 20th 1926, to date, aggregating \$342.30, together with \$800.00 attorney fee, making a total of \$4,677.30, together with the plaintiff's costs and disbursements herein taxed in the sum of \$46.35 and that plaintiff have execution therefor. [29]

AND AFTERWARDS, to wit, on the 2d day of March, 1928, there was duly filed in said court a verdict, in words and figures as follows, to wit: [30]

[Title of Court and Cause.]

VERDICT.

We, the jury duly empaneled and sworn to try this cause, find for the plaintiff and assess her damages at \$3,535.00, with interest thereon at 6% per annum from July 20th, 1926, to date, aggregating \$342.30.

We also find that \$800.00 is a reasonable attorney fee to be allowed the plaintiff for bringing and prosecuting this action.

WHEREFORE, we find our verdict in favor of the plaintiff and against the defendant in the aggregate sum of \$4,677.30.

W. H. DURHAM,
Foreman.

Filed March 2, 1928. [31]

AND AFTERWARDS, to wit, on the 19th day of March, 1928, there was duly filed in said court a notice of appeal, in words and figures as follows, to wit: [32]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To Bertha E. Lipp, the Above-named Plaintiff, and to Messrs. H. F. McInturff, Wm. T. Stoll and J. W. McInturff, Her Attorneys:

YOU ARE HEREBY NOTIFIED that defendant asserts that in the trial of the above-entitled cause certain errors were committed to the prejudice of defendant, all of which will more in detail appear from the assignment of errors which is filed with this notice of appeal, and that defendant appeals from the judgment made and entered in the above-entitled cause on the 2d day of March, 1928, and the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of.

McCAMANT & THOMPSON,
RALPH H. KING,

Attorneys for Defendant.

Due service of the within notice of appeal is admitted this 19th day of March, 1928.

H. F. McINTURFF,
Of Attorneys for Plaintiff.

Filed March 19, 1928. [33]

AND AFTERWARDS, to wit, on the 19th day of March, 1928, there was duly filed in said court an assignment of errors, in words and figures as follows, to wit: [34]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now on this 19th day of March, 1928, comes the defendant, The Mutual Life Insurance Company of New York, by its attorneys, McCamant & Thompson and Ralph H. King, and says that the judgment entered in the above cause on the 2d day of March, 1928, is erroneous and unjust to the defendant for the following reasons:

I.

That the District Court of the United States for the District of Oregon erred in receiving in evidence as Plaintiff's Exhibit "I" the record of the complaint, answer, verdict and judgment in that certain case between Bertha E. Lipp, plaintiff, and The Mutual Life Insurance Company of New York, a corporation, defendant, in the Circuit Court of the State of Oregon for Coos County over the objection and exception of defendant; that the same was incompetent, irrelevant and immaterial and not embraced within the issues of the present action, and that the effect of such judgment had not been pleaded as an estoppel or in any manner.

II.

That the District Court of the United States for

the [35] District of Oregon erred in sustaining the objection of plaintiff and refusing to admit in evidence the following proof offered by the defendant upon the issue as to the death of John E. Lipp, the insured:

The deposition of Leo Van Atta, marked Defendant's Exhibit "A" for Identification.

The certified copy of mortgage, dated July 26, 1923, by J. A. Lipp to Vancouver National Bank, marked Defendant's Exhibit "B" for Identification.

A certified copy of a partial lease of the foregoing mortgage, marked Defendant's Exhibit "C" for Identification.

A certified copy of the complaint and affidavit for publication in that certain suit in the Superior Court of the State of Washington for Clarke County, wherein Bertha E. Lipp is plaintiff and John A. Lipp is defendant, marked Defendant's Exhibit "D" for Identification.

A certified copy of the interlocutory order in the same suit, bearing date November 23, 1925, marked Defendant's Exhibit "E" for Identification.

The offer of proof of the testimony of John Egger.

The offer of proof of the testimony of E. M. Dietrich.

The offer of proof of the testimony of M. G. Osborne.

The offer of proof of the testimony of Lewis Kadow.

The offer of proof of the testimony of William A. Thompson.

The offer of proof of the testimony of W. P. Davis.

The offer of proof of the testimony of Henry Huber.

The offer of proof of the testimony of John Schmander.

The offer of proof of the testimony of Charles W. Hall.

The offer of proof of the testimony of E. S. Lipp.

The offer of proof of the testimony of Emma Lipp.

The offer of proof of the testimony of J. B. Macken.

The offer of proof of the testimony of Alma D. Katz. [36]

The offer of proof of the testimony of Dr. Charles Folsom,

all witnesses called for and on behalf of defendant, and to which offers of proof the plaintiff objected, first, because those matters were all investigated and litigated in a former action between the same parties and a final adjudication had thereon; second, because the same is incompetent, irrelevant and immaterial and may not be admitted to impeach, contradict, vary, gainsay, or deny the judgment and verdict rendered between the plaintiff and defend-

ant in the trial in the Circuit Court of Coos County in March, 1926.

III.

That the District Court of the United States for the District of Oregon erred in giving to the jury the following instruction:

“I will say, in the first instance, that as to the death of the deceased, that matter was formerly litigated between these parties, in an action commenced in Coos County, Oregon. In that action there was an issue raised upon the question as to whether the deceased, Lipp, died on the 31st day of January, 1924. That issue was determined in favor of the plaintiff, and, so far as this case is concerned, it is conclusive upon the parties to this action. So you will assume that the deceased died on that date, as set forth in the complaint.”

over the following exception of the defendant:

“Defendant desires to except, if the court please, to the instruction of the court that the defendant is concluded in this action as to the issue of the death of John A. Lipp by reason of the judgment in the former action in Coos County.” [37]

WHEREFORE, the defendant prays that the said judgment made and entered on the 2d day of March, 1928, be reversed and that the District Court of the United States for the District of Oregon be directed to reverse said judgment and to direct a verdict in favor of said defendant and to award

said defendant its costs and disbursements incurred in said action.

McCAMANT & THOMPSON,
RALPH H. KING,
Attorneys for Defendant.

Due service of the within assignment of errors is admitted this 19th day of March, 1928.

H. F. McINTURFF,
Of Attorneys for Plaintiff.

Filed March 19, 1928. [38]

AND AFTERWARDS, to wit, on the 19th day of March, 1928, there was duly filed in said court a bond on appeal, in words and figures as follows, to wit: [39]

[Title of Court and Cause.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, That we, The Mutual Life Insurance Company of New York, a corporation organized and existing under the laws of the State of New York, as principal, and United States Fidelity & Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, as surety, are held and firmly bound unto Bertha E. Lipp, plaintiff herein, in the full and just sum of Six Thousand Dollars (\$6,000.00), to be paid to the said plaintiff, her attorneys, executors, administrators

or assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals this 19th day of March, A. D. 1928.

WHEREAS lately in the District Court of the United States for the District of Oregon, in an action in said court between Bertha E. Lipp, plaintiff, and The Mutual Life Insurance Company of New York, defendant, a judgment was rendered against the said The Mutual Life Insurance Company of New York, defendant, [40] for the sum of \$3,535.00, and the further sum of \$342.30 interest, and the further sum of \$800.00 attorneys fees, and for costs taxed in the amount of \$46.35; and the said The Mutual Life Insurance Company of New York having taken its appeal from said judgment and the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, and filed its notice of appeal in the Clerk's office of said court, to reverse the judgment in the aforesaid action;

Now, the condition of the above obligation is such that if the said The Mutual Life Insurance Company of New York shall prosecute its appeal to effect or shall pay the aforesaid judgment and answer all damages for costs, if it fail to make the said plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

By RALPH H. KING,
Of Its Attorneys.

UNITED STATES FIDELITY & GUAR-
ANTY COMPANY,

By WALTER F. CLINE,
Its Attorney-in-fact.

[Seal]

Countersigned: By WALTER F. CLINE,
Resident Agent.

Due service of the within bond on appeal is ad-
mitted this 19th day of March, 1928.

H. F. McINTURFF,
Of Attorneys for Plaintiff.

Filed March 19, 1928. [41]

AND AFTERWARDS, to wit, on the 19th day of
March, 1928, there was duly filed in said court
a praecipe for the transcript of record, in words
and figures as follows, to wit: [42]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

The Clerk of this court is hereby directed to pre-
pare and certify copy of the record in the above-
entitled cause for the use of the United States Cir-
cuit Court of Appeals for the Ninth Circuit, in-
cluding the following documents:

Complaint.

Answer.

Verdict.

Judgment.

Notice of appeal.

Bond on appeal.

Citation on appeal.

Assignment of errors.

Praecepte for transcript of record.

Bill of exceptions.

McCAMANT & THOMPSON,

RALPH H. KING,

Attorneys for Defendant.

Due service of the within praecipe for transcript of record is admitted this 19th day of March, 1928.

H. F. McINTURFF,

Of Attorneys for Plaintiff.

Filed March 19, 1928. [43]

AND AFTERWARDS, to wit, on the 26th day of March, 1928, there was duly filed in said court a bill of exceptions, in words and figures as follows, to wit: [44]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED, That the above-entitled cause came on regularly for trial before the Hon. John H. McNary, Judge of the above-entitled court, and a jury, on Thursday, the 1st day of March, 1928, and plaintiff appearing in person and by her attorneys, H F. McInturff, J. W. McInturff, and Wm. T. Stoll, and the defendant appearing by its

(Testimony of W. Y. Masters.)

attorneys, McCamant & Thompson and Ralph H. King, and thereupon the following proceedings were had and testimony taken, to wit:

TESTIMONY OF W. Y. MASTERS, FOR
PLAINTIFF.

W. Y. MASTERS, a witness called for plaintiff, testified that he was a practicing attorney, and as to reasonable attorneys' fees for prosecution of the present action.

Thereupon the following proceedings were had:

"Mr. McINTURFF.—We now offer this record in evidence, being the record of the complaint, the answer, the verdict and the judgment in that certain case between Bertha E. Lipp, plaintiff, and the Mutual Life Insurance Company of New York, a corporation, defendant.

COURT.—Let me ask—is the identity of the plaintiff and the defendant disputed?

Mr. KING.—No, it is not, your Honor.

COURT.—It will be admitted.

Mr. KING.—I would like to object to the offer, if the Court please, on the ground it is incompetent, irrelevant and immaterial, is not embraced within the issues of the present action, [45] and the effect of such judgment has not been pleaded as an estoppel, or in any other manner.

COURT.—The objection will be overruled.

Mr. KING.—Exception allowed, please.

COURT.—Yes."

Thereupon the judgment-roll was marked as Plaintiff's Exhibit 1.

TESTIMONY OF BERTHA E. LIPP, IN HER
OWN BEHALF.

BERTHA E. LIPP, plaintiff, was called as a witness for herself and testified that she was a resident of the State of Oregon.

Like testimony was given by Rita Lipp, Leila Bushman, Lyle Lipp and Margaret L. Ackley.

TESTIMONY OF PAUL F. NOLAN, FOR
PLAINTIFF.

PAUL F. NOLAN, called as a witness for plaintiff, fixed the amount of insurance in force upon the policy of insurance as \$3,535.00.

TESTIMONY OF JOHN B. CLELAND, FOR
PLAINTIFF.

JOHN B. CLELAND, a witness for plaintiff, testified as to what sum would be reasonable as attorneys fees to be allowed plaintiff.

Plaintiff introduced policy of insurance in evidence as Plaintiff's Exhibit 2, and proofs of death were admitted in evidence on behalf of plaintiff as Plaintiff's Exhibit 3.

Thereupon plaintiff rested her case.

Thereupon the following proceedings were had:

"Mr. KING.—If the Court please, in order that I may make a record in this case, I would like to draw a chair up to the reporter and dictate, in your Honor's hearing, an offer of proof; the proof by

each individual witness being considered as a several offer of proof, so that we won't have to go through all the objections and offers as I dictate it, but each offer being separate as far as the record is concerned.

COURT.—Do you mean to say you want to offer proof upon your part to show that the insured is not dead?

Mr. KING.—It won't be a very long offer, but I want to make the record. [46]

COURT.—I don't see what the purpose of that would be. I don't see how that would better your situation.

Mr. KING.—There is some question in my mind whether I have a complete record without making such offer. It won't take very many minutes. I don't think counsel wants to insist on my bringing the witnesses into court in order to do it.

COURT.—Very well. Gentlemen of the Jury, you may be excused for, say, fifteen minutes, but remain within call.

Mr. KING.—At this time the defendant makes the following offers of proof, asking that each of the several documents and the testimony of each of the several witnesses be, for the purpose of the record, considered a several offer, and that, if the Court reject all of said testimony, the defendant have and save an exception to the rejection of each of the said several offers.

The defendant requests the Court to take judicial knowledge of section 2601, including all its sub-

divisions, of Remington's Compiled Code of 1922, Statutes of Washington; section 2602, section 2603 and section 2605 of the same compilation of statutes.

The defendant asks that the deposition of Leo Van Atta be marked for identification, and offers the testimony of such witness in evidence.

(Marked Defendant's Exhibit "A" for Identification.)

The defendant offers certified copy of that mortgage dated July 26, 1923, by J. A. Lipp of Vancouver, mortgagor, to Vancouver National Bank of Vancouver, and asks that the same be marked for the purpose of identification.

(Marked Defendant's Exhibit "B" for Identification.)

The defendant offers a partial release of the foregoing mortgage, the same being executed under date of June 27, 1924.

(Marked Defendant's Exhibit "C" for Identification.)

Defendant offers a certified copy of the complaint and affidavit for publication in that certain suit, being No. 10377, in the Superior Court of the State of Washington for Clarke County, wherein Bertha E. Lipp is plaintiff and John A. Lipp defendant, together with a certified copy of the affidavit of publication in said suit, both being certified under one certificate, and asks that same be marked for identification.

(Marked Defendant's Exhibit "D" for Identification.) [47]

(Testimony of John Egger.)

Defendant also offers a certified copy of the interlocutory order in the same suit, bearing date November 23, 1925.

(Marked Defendant's Exhibit "E" for Identification.)

TESTIMONY OF JOHN EGGER, FOR DEFENDANT.

JOHN EGGER, if permitted to testify, would state that he has known John A. Lipp for twelve years; that he worked on Waucomah Farm with John A. Lipp from 1916 to the year 1920; that he saw John A. Lipp every day, and talked to him; that Lipp's disposition was cheerful; that he recalls the occasion of the accident to John Lipp in the cornfield, while operating the tractor, and that such accident, beyond incapacitating John Lipp for several days, did not change his mental attitude in any respect.

TESTIMONY OF E. M. DIETRICH, FOR DEFENDANT.

E. M. DIETRICH, a witness for the defendant, if permitted to testify, would state that he has known John Lipp for eight years prior to his disappearance; that Lipp purchased supplies at the hardware store conducted by witness in Vancouver, Washington; that on the afternoon of January 31, 1924, he went out on a repair job, and at the edge of the City of Vancouver, near the shipyards, he

(Testimony of E. M. Dietrich.)

saw John A. Lipp standing beside the Waucomah Farm truck and talking to one Harry S. Smith, a business man of Vancouver; that he knows the community reputation in the City of Vancouver as to whether John A. Lipp is dead or alive, and that said community reputation is that John A. Lipp is alive.

TESTIMONY OF M. G. OSBORNE, FOR DEFENDANT.

M. G. OSBORNE, a witness for defendant, if permitted to testify, would state that he is a business man in Vancouver; that he knew Lipp for eight years prior to his disappearance, and would give the same testimony as the witness Dietrich with respect to community reputation.

TESTIMONY OF WILLIAM A. THOMPSON, FOR DEFENDANT.

WILLIAM A. THOMPSON, a witness for defendant, if permitted to testify, would state that he is ex-sheriff of Clarke County, Washington; that he was sheriff at the time of the disappearance of John A. Lipp; that as sheriff he conducted an investigation into the disappearance of John A. Lipp; that he knows the community reputation as to whether the said John A. Lipp is dead or alive, and that such reputation is that John A. Lipp is alive.

TESTIMONY OF LEWIS KADOW, FOR DEFENDANT.

LEWIS KADOW, a witness for defendant, if permitted to testify, would state that he operates a farm near Waucomah Farm; that he knew John Lipp well during the twelve years that he was on Waucomah Farm; that he was on the school board with John Lipp; that Lipp had a cheerful, jolly disposition; that he knows the community reputation and the neighborhood reputation as to [48] whether John A. Lipp is dead or alive, and that said general reputation is that John A. Lipp is alive.

TESTIMONY OF W. P. DAVIS, FOR DEFENDANT.

W. P. DAVIS, a witness for defendant, if permitted to testify, would state that he knew John A. Lipp for fifteen years prior to his disappearance; that he was the treasurer of the Farmers' Telephone Lines, to which are connected both Waucomah Farm and his own home; that John A. Lipp never paid to him any money collected for said telephone line from Henry Huber, a neighbor of both Lipp and himself; that Lipp was cheerful and jolly in his disposition. His testimony as to the neighborhood reputation would be the same as that of the witness Kadow. He would further testify that he saw Lipp on the day of his disappearance at six o'clock in the morning; that Lipp stopped at his place to fix a tail light on the farm truck.

TESTIMONY OF HENRY HUBER, FOR DEFENDANT.

HENRY HUBER, a witness for defendant, if permitted to testify would state that he knew John A. Lipp for fifteen years prior to his disappearance; that he was on very friendly and intimate acquaintance with John A. Lipp; that during the two years prior to John A. Lipp's disappearance on a number of occasions John A. Lipp discussed with him his situation on Waucomah Farm, and stated to him that he was dissatisfied, that he was unable to save any money, and that his family associations were not satisfactory; that he contemplated going to South America, particularly the State of Argentina, in the cattle business; that on January 21, 1924, he gave Lipp a check for \$60 for his part of the Farmers' Mutual Telephone Line; that John Lipp cashed said check on January 22, but never paid over the said funds to W. P. Davis, treasurer of said mutual telephone lines.

TESTIMONY OF JOHN SCHMANDER, FOR DEFENDANT.

JOHN SCHMANDER, a witness for defendant, if permitted to testify, would state that he knew Lipp for six years prior to his disappearance; that witness is engaged in the business of buying cattle, and in such business frequently saw John Lipp; that on or about December 1, 1923, John Lipp came

(Testimony of John Schmander.)

to him and requested him, on the basis of friendship, to loan him \$500; that he granted the request to the said John A. Lipp, who promised to repay said amount in thirty days; that John Lipp failed to repay the same in thirty days, and furnished as an excuse therefor the fact that he had not yet dug his potatoes; that the said John A. Lipp never did repay said amount. [49]

TESTIMONY OF CHARLES W. HALL, FOR DEFENDANT.

CHARLES W. HALL, a witness for defendant, if permitted to testify, would state that Mrs. Lipp consulted him as an attorney; that she desired to assert a claim against personal property on Waucomah Farm; that he instituted a suit for divorce against John A. Lipp; that after said suit had been commenced, and after an interlocutory decree had been secured, Mrs. Lipp came to him and instructed him to dismiss said suit; that said suit was not dismissed pursuant to his advice.

TESTIMONY OF E. S. LIPP, FOR DEFENDANT.

E. S. LIPP, a witness for defendant, if permitted to testify, would state that he is the father of John Lipp; that he resides at Salem; that John Lipp visited back and forth about once a year; that John Lipp was not much of a person to write—that he seldom, if ever, received a letter from him; that

(Testimony of E. S. Lipp.)

John Lipp made a visit to the witness' home in Salem in April, 1923, and at such time discussed his intention of going to South America to look over the cattle business down there; that John Lipp's front teeth were not loose; that he did not have pyorrhea; that witness does not believe him to be dead.

TESTIMONY OF EMMA LIPP, FOR DEFENDANT.

EMMA LIPP, a witness for defendant, if permitted to testify, would state that she is the mother of John Lipp; that she recalls the time of his disappearance; that about two months thereafter Bertha E. Lipp, the plaintiff in this action, came to her home near Salem, Oregon; that at such time and place Bertha E. Lipp berated her husband, John A. Lipp, for many shortcomings; that prior to February 15, 1927, Mrs. Bertha E. Lipp and her attorney came to see the witness and her husband, and asked them to swear that they thought John Lipp was dead; that witness and her husband refused said request; that John Lipp's front teeth were not loose; that he did not have pyorrhea; that within a year prior to his disappearance John Lipp discussed with witness his intention of going to South America to look over the cattle business, and further told her that he had found out how much it would cost for said trip, and that the amount was \$300.

TESTIMONY OF J. B. MACKEN, FOR DEFENDANT.

J. B. MACKEN, a witness for defendant, if permitted to testify, would state that, on January 31, 1924, he was requested by Mr. Katz to accompany him to the Vancouver National Bank, in Vancouver, Washington; that he acceded to said request, and went to said bank; that a conference was held, at which he was not present, and that thereafter he and Dr. Wight drove out on the river road near the old shipyard, and there discovered the farm truck of Waucomah Farm, abandoned. [50]

TESTIMONY OF ALMA D. KATZ, FOR DEFENDANT.

ALMA D. KATZ, a witness for defendant, if permitted to testify would state that no partnership agreement was ever made with the said John A. Lipp; that on January 31, 1924, he was advised that the Vancouver National Bank claimed a mortgage on some personal property on Waucomah Farm; that he denied the validity of said mortgage; that a conference was held at Vancouver National Bank, and that at such conference it was agreed to call in John A. Lipp; that he placed a telephone call for John A. Lipp, and upon reaching him on the telephone requested him to come to the bank; that he never arrived at the bank, and that thereafter Dr. Wight, who was at the conference, left for Waucomah Farm, and discovered the farm truck abandoned near the shipyards.

TESTIMONY OF DR. CHARLES FOLSOM,
FOR DEFENDANT.

Dr. CHARLES FOLSOM, a witness for defendant, if permitted to testify, would state that he is a practicing dentist in the city of Portland; that he did dental work for John A. Lipp on February 25, 1922; that said work consisted of a filling in the upper right bicuspid and a like filling in the upper left bicuspid, consisting of the occlusal and distal surfaces.

Mr. STOLL.—All of which is objected to by plaintiff, because first, those matters were all investigated and litigated in a former action between the same parties, and a final adjudication had thereon.

Second, the same is incompetent, irrelevant and immaterial, and may not be admitted to impeach, contradict, vary, gainsay, or deny the judgment and verdict rendered between plaintiff and defendant in the trial in the Circuit Court of Coos County in March, 1926.

Mr. McINTURFF.—Would you make one further statement: that the purpose of all that testimony would be to tend to prove that John A. Lipp was not dead?

Mr. KING.—It shows that on the face.

Mr. McINTURFF.—Will you make that statement? Otherwise, I would like to hear it all.

If you offer that merely for the purpose of tending to show or prove, if you will, that John A. Lipp

is not dead, and did not die on that date, then I think the Court can properly overrule it all. Otherwise, we would like to hear it all; if there is any statement in there relative to her citizenship, of course, that is competent, or attorney's fees—those matters that are in controversy.

Mr. KING.—I can straighten that out by saying, defendant offers said foregoing several offers of proof upon the issue as to the death of John A. Lipp only. [51]

COURT.—I will sustain the objection.

Mr. KING.—We will save an exception to the rejection of several offers of proof.

COURT.—Very well."

Thereupon the defendant rested.

Thereupon the Court instructed the jury, among other things, as follows:

"I will say, in the first instance, that as to the death of the deceased, that matter was formerly litigated between these parties, in an action commenced in Coos County, Oregon. In that action there was an issue raised upon the question as to whether the deceased, Lipp, died on the 31st day of January, 1924. That issue was determined in favor of the plaintiff, and, so far as this case is concerned, it is conclusive upon the parties to this action. So you will assume that the deceased died on that date, as set forth in the complaint."

Thereupon the defendant excepted to the instruction set out hereinabove, which exception was allowed, as follows:

“Mr. KING.—Defendant desires to except, if the Court please, to the instruction of the Court that the defendant is concluded in this action as to the issue of the death of John A. Lipp by reason of the judgment in the former action in Coos County.

COURT.—You may have your exception.”

CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS.

Now, being willing that a record should be made of the testimony and proceedings had at the said trial within the time allowed by the rules of this Court and fixed by its special order made in this cause for settlement of defendant's bill of exceptions, I, John H. McNary, Judge of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing bill of exceptions contains a full, true and correct statement in narrative form of all and the whole of testimony taken and proceedings had upon the trial of said cause, and [52] that there is set forth therein in narrative form a full, true and correct statement of all the testimony and evidence that was before the Court; and that, with the said exhibits marked Plaintiff's Exhibits 1, 2 and 3 respectively, defendant's said bill of exceptions contains all and the whole of the evidence that was before the Court.

There is filed herewith and made a part of the record in this cause all of the exhibits offered and received in evidence in the trial of the cause, Plain-

tiff's Exhibits 1, 2 and 3. There is also filed herewith and made a part of the record in this cause Defendant's Exhibits "A," "B," "C," "D" and "E" for identification, which exhibits were offered by the defendant and, upon the objection of the plaintiff, were not received in evidence, all of which more fully appears in the foregoing bill of exceptions, and I hereby settle and allow this bill of exceptions this 26th day of March, 1928.

JOHN H. McNARY,
District Judge. [53]

Now, within the time allowed by the rules of this court and special orders made and entered herein extending the time in which defendant may enter its bill of exceptions herein defendant hereby presents and tenders for settlement this bill of exceptions this — day of March, 1928.

_____,
_____,
Attorneys for Defendant.

District of Oregon,
County of Multnomah,—ss.

Due service of the within bill of exceptions is admitted this 19th day of March, 1928.

H. F. McINTURFF,
Of Attorneys for Plaintiff.

Filed March 26, 1928. [54]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages, numbered from three to fifty-four, inclusive, constitute the transcript of record upon appeal from the judgment entered in a case in said court in which Bertha E. Lipp is plaintiff and appellee and The Mutual Life Insurance Company of New York, a corporation, is defendant and appellant; that the said transcript has been by me compared with the original record thereof and is a full, true and complete transcript of the record and proceedings had in said court in said cause, as the same appear of record and on file at my office and in my custody.

I further certify that the cost of the foregoing transcript is \$20.00, and that the same has been paid by the said appellant.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Portland, in said District, this 26th day of April, 1928.

[Seal]

G. H. MARSH,

Clerk. [55]

[Endorsed]: No. 5478. United States Circuit Court of Appeals for the Ninth Circuit. The Mutual Life Insurance Company of New York, a Corporation, Appellant, vs. Bertha E. Lipp, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Oregon.

Filed April 30, 1928.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the District Court of the United States for the District of Oregon.

No. L.—10207.

April 16, 1928.

BERTHA E. LIPP,

Plaintiff,

vs.

THE MUTUAL LIFE INSURANCE COMPANY
OF NEW YORK, a Corporation,
Defendant.

ORDER UNDER SUBDIVISION 1 OF RULE 16
ENLARGING TIME TO AND INCLUDING
APRIL 30, 1928, TO FILE RECORD AND
DOCKET CAUSE.

Now at this day for good cause shown IT IS
ORDERED that the time for filing the transcript

of record in this cause and docketing the same in the United States Circuit Court of Appeals for the Ninth Circuit be and the same is hereby extended to and including April 30, 1928.

JOHN N. McNARY,
Judge.

[Endorsed]: Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including April 30, 1928, to File Record and Docket Cause. Filed Apr. 30, 1928. Paul P. O'Brien, Clerk. [58]